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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN ALBERTO CHARABICENTE,

Defendant and Appellant.

B200355

(Los Angeles County
Super. Ct. No. BA282253)

APPEAL from a judgment of the Superior Court for the County of Los Angeles.
Barbara J. Johnson, Judge. Reversed.

Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kristopher Jorstad and Robert S. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

The defendant was convicted of second degree murder, and contends on appeal that the trial court erred in refusing his request to instruct the jury on the lesser included offense of involuntary manslaughter. We agree, and reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Juan Alberto Charabiciente was charged by information with the murder of Besheale Goldsmith, a prostitute with whom he and at least one other unidentified male had had sexual intercourse. The evidence at trial showed the following circumstances.

The cause of the victim's death was asphyxia due to strangulation. The coroner found abrasions, as well as faint bruising, on the victim's neck, and petechia (pinpoint hemorrhages) in her eyes. There were also small, focalized internal hemorrhages in three different areas in the neck muscles, consistent with strangulation caused by a hand or a forearm around the neck. The coroner found cocaine in the victim's system, and "put cocaine use as a contributory cause" of the victim's death. The coroner explained that cocaine has significant physiological effects on the body, could have affected blood pressure, and may have played a physiological role in the victim's death, but was not the cause of death. When asked how much force was required for a strangulation, the coroner responded that, in the case of adults, "it does require a certain amount of force because the other person may be able to attempt to fight back or release the hold. . . . The actual compression on the neck, once you get a good hold on the arteries and if that person is not able to release the hold, it's a matter of 10, 15 seconds before that person goes unconscious. [¶] . . . But the actual amount of force, . . . it's not a large amount of force to, you know, cause somebody even just to faint or to kill somebody from strangulation."

The victim's body was found in a van parked on the street in front of an auto repair shop. Charabiciente worked at the shop, and also lived there, in a small makeshift space or storage space. The body was found by another employee at the shop, Axel Gamboa, shortly after he arrived at work at about 8:20 a.m. on April 19, 2005. Death occurred sometime between the late evening hours of April 18 and the early morning

hours (4:00 or 5:00 a.m.) of April 19. The van in which the body was found had been at the shop for several months, after being donated to a church and then given to Gamboa for repairs to the transmission that proved unsuccessful. It was parked on the street, and when Gamboa arrived at work, he went to move the van (because of parking restrictions) from one side of the street to the other. Gamboa saw the victim inside the van, naked from the waist down, and thought she was asleep. Gamboa called Charabiciente over to look at the victim, and Charabiciente said, "Could she be dead?" and then went back to work. Gamboa also told the shop owner, Tony Castro, and some time later Gamboa flagged down a passing patrol car and told the police; patrol officers arrived on the scene between 12:30 and 1:00 p.m. Detectives took Gamboa to the station, where he told them what he had seen. Gamboa then went back to the shop and talked to the owner and Charabiciente. Charabiciente said that "he did sleep with the lady but he hadn't killed her." Either that day or the following day, Gamboa and the owner took Charabiciente to lunch. Gamboa and the owner told Charabiciente that "if he had made such a mistake," he should "give his life over to Jesus," who would forgive his sin and take care of him. They told him to go to the police with the truth, but Charabiciente said the only thing he did was have sex with the victim. Gamboa testified that he had known Charabiciente since October 2004; Charabiciente was quiet, and Gamboa never saw him drink, smoke or use drugs.

DNA analysis showed Charabiciente was one of two contributors to a sperm sample taken from a swab of the victim's external genitalia, but was not a contributor to sperm samples from a vaginal swab and an anal swab. Charabiciente's DNA was not found on the condom found at the scene, which contained DNA from the same unknown male whose DNA was on the external genital swab. Charabiciente's DNA was found on three locations on the victim; the unknown male's was found on 10 locations.

In the van, the police found a backpack, jeans, jacket, tennis shoes, and miscellaneous debris, including cigarette butts, a Styrofoam cup, a condom in a wrapper, a bottle, and some beverage items.

Charabicente was interviewed by Detective Castillo and Detective Alberto Rosa¹ on April 20, 2005. The interview was conducted in Spanish, and a certified English translation of the audio recording was received in evidence, as well as Castillo's testimony about the interview.² The entire interview, which lasted a little over an hour or so, was conversational; Charabicente was soft-spoken throughout the interview, and Detective Castillo did not raise his voice or do anything to provoke Charabicente. Castillo testified that:

- Charabicente initially denied having any contact with the victim or any knowledge of her death, except for a brief contact the previous day, when the victim came into the shop asking for a lighter. Thus:
 - When Detective Castillo first asked what happened between Charabicente and the victim, Charabicente recounted the incident with the lighter, and said he “didn’t know anymore, but the next day I knew that Mr. Gamboa called me.” Castillo said he knew about Charabicente’s conversations with the owner and Gamboa, and asked again what happened. Charabicente said the victim came back later that night and they had sex, in his little room, not in the van. She came at around 10:00 in the evening. She had been staying in the van “for I don’t know how many days,” one or two days. She was on drugs; he gave her five dollars; she left and came back 10 minutes later, and was “really high.” She started playing music, “real loud,” and began to jump and knock things down. He thought she was going to cause a lot of trouble, and wanted to get her out because of the noise, so he suggested

¹ The transcript of the interview identifies the second detective as Detective David Contreras, but Detective Castillo testified that Detective Rosa was present with him during the interview and identified Rosa’s voice when parts of the audio recording were played in court.

² At the interview, Charabicente spelled his name with a “v” rather than a “b”.

they go out to buy some beer. They went out and walked by the van, and then he ran back to the shop, closed the door and “went into the little room and stayed there.”

- When questioned about whether they had sex in the van, Charabicente said he was positive they did not, but that:

Charabicente: “in the van there was sex earlier, with --

Det. Castillo: “Uh?

Charabicente: “She had sex there [in the van] with I don’t know who.”

- Detective Castillo then questioned Charabicente about whether “this” was a mistake (without specifying what “this” meant):

Castillo: “. . . You tell me, which one is it? A mistake, one time, or you’ve already . . . several times?

Charabicente: “Like you said, a—the rest of the people, they tell you that I’ve worked and I—‘Cause I have my three children in –

Castillo: “Okay, . . .

Charabicente: “Because I know – I can –

Castillo: “. . . Juan . . . Juan, but answer my question. Was this sometime a mistake? [sic] Or you have . . . you have committed this crime several times?

Charabicente: “No, this was my first mistake.

Castillo: “Okay.

Charabicente: “First [unintelligible] that I, uh, that I’m like giving a statement and everything, ‘cause the truth is that I stay there because Tony [the shop owner] has put his trust in me.”

- Detective Castillo then asked why Charabicente put his hand on the victim’s neck, and Charabicente said, “To quiet her down ‘cause, you know, she was being very noisy, you know, and I was telling her, ‘Don’t be so loud ‘cause people can hear.’”

Further:

Castillo: “Okay. And, and about how many times did you grab her by the neck?

Charabicente: “Mmm, about one time. One time.

Castillo: “And m— and how l— and for how long?

Charabicente: “Oh, just . . . just to distract her.

Castillo: “About ten minutes?

Charabicente: “No.

Castillo: “Or about . . . about – You tell me.

Charabicente: “No, it’s like about two minutes or –

Castillo: “[Overlapping voices] About two – ?

Charabicente: “But no, not minutes. It’s about ten seconds, ‘cause imagine. It’s like, she’s like this and I hold her and, pas! She –

Castillo: “Yes. Tell me how. Um, grab yourself and tell me how you grabbed her.

Charabicente: “Like this, but, you know, like calm. Not with the intention –

Castillo: “But not . . . but not with force, right? Because – So that she would be quiet, you said.

Charabicente: “Yes, so she would stop, you know.

Castillo: “And when she did that, what happened? Look at me.

Charabicente: “Yes.

Castillo: “Look here. When you grabbed her from here, from the neck, what happened? Did she scream more or did she stop screaming?

Charabicente: “Oh, no, she gets up and starts screaming.

Castillo: “And then what did you do?

Charabicente: “That’s when I told her, ‘You know what? Let’s go out [unintelligible].

Castillo: “And then you grabbed the neck even more.

Charabicente: “No. ‘Let’s get out,’ and I got her out.”

- When asked if he grabbed the victim by the neck with two hands, Charabicente said, “No, not with both hands. It was one hand.”

- Detective Castillo asked Charabicente several times whether the victim lost consciousness when Charabicente touched her neck, and Charabicente repeatedly said no. Then Castillo said, after again confirming Charabicente squeezed the victim's neck to quiet her down, that: "And there was a moment when she must have given up," and Charabicente responded, "Yes." Charabicente said, in response to Castillo's suggestion that Charabicente and the victim were alone when the victim died, that he wasn't with her when she died, because he took her out.
- Detective Castillo testified that Charabicente told him that the victim lost consciousness "during that episode of his hand on her neck." Castillo also responded "yes," to the question whether Charabicente had "indicate[d] to [Castillo] whether he was involved with the death of [the victim]," and then said that Charabicente said "that she had given up and stopped breathing." (The transcript of the interview contradicts Castillo's testimony; Charabicente did *not* say the victim had stopped breathing. He merely responded in the affirmative to Castillo's statement that the victim "must have given up;" there was no indication that "given up" meant "died" rather than quieted down.) Thereafter, Charabicente continued to respond in the negative to Castillo's suggestions that he had killed the victim.
- Detective Castillo testified that he asked Charabicente "if this was an accident or a mistake or was it something that was aggressive or violent, and he went on to tell me that it was a mistake," and that nothing was planned. The actual exchange was:

| | |
|---------------|---|
| Castillo: | "... I want to know if it was something aggressive, something with misunderstanding, with a mind like you wanted to get rid of her, ... |
| Charabicente: | "[Overlapping voices] No. |
| Castillo: | "... or if it was a mistake. You tell me what was it. Was it a mistake? ... She had a sister and a – some |

relatives. What do you want me to tell them from you?

Charabicente: “Well, I don’t know what to tell the[m] because I didn’t –

Castillo: “Do you want me to tell them to ... to ask for your forgiveness? [sic] ... You tell me. I don’t know.

[No Verbal Activity]

Charabicente: “I don’t know what to do.

Castillo: “Do you regret it?

Charabicente: “I don’t know what to do. ‘Cause I have children, uh –

Castillo: “I know. I know. And you know what? I’m not going to say anything to anybody in your family, to any of your children. I just want to know if it was a mistake or it was something you were planning –

Charabicente: “No, how can you say that!

Castillo: “Well, you tell me.

Charabicente: “Nothing was planned.

Castillo: “Well, the[n] it was ... this was a mistake.

[No Verbal Activity] [¶] ... [¶]

Castillo: “ Okay, but I’m talking about when she died. That was a mistake. Right, Juan? ... It was. Wasn’t it, Juan? It was a mistake that you made, which you regret. Is that true?

Charabicente: “A mistake, because –

Castillo: “Okay. S— and when she— when you realized it, when you were with her and she stopped breathing, what did you think? ... You tell me, what happened? I want you to –

Charabicente: “[Overlapping voices] Nothing. Nothing happened.”

- When Detective Castillo told Charabicente, “[Y]ou just said that it was a mistake,” Charabicente responded, “The mistake was having brought her into the room to

have sex with me.” Thereafter, Charabicente again said the victim didn’t stop breathing, but just calmed down.

- Detective Castillo testified that, toward the end of the interview, Charabicente said “that he had his hand on [the victim’s] neck and that she was coughing forcefully and that at one point she stopped breathing and he started to do chest compressions in hopes of reviving her.”³ The transcript, however, is not so clear. Charabicente said that he pounded on the victim’s chest to revive her, and that when he saw she was dead, he felt fear because “I had to be responsible for that, anyway.” But the timing and location of events are not clear, and Charabicente did not say the victim stopped breathing while he had his hand on her neck.⁴ The exchange, and the entire remainder of the interrogation, was as follows:

Castillo: “You ha—you haven’t killed any—any more people. Or have you? . . . This time that f— this young woman died, and died in your hands, was it an accident or was it something intentional?”

[No verbal activity]

Charabicente: “No, well –

Castillo: “You tell me. Was it an accident or was it intentional?”

[No verbal activity]

³ Similarly, Detective Castillo answered “yes” to the question: “Now, you indicate that [Charabicente] had put his hand around her and that she had stopped breathing; is that right?” Castillo continued: “[Charabicente] actually, when I asked him if his hand on the neck caused the death, he went on to say he thought it was more the drugs in her system than the actual hold on her neck because right before she died she coughed very forcefully.”

⁴ Detective Castillo also testified that Charabicente’s demeanor changed at this point in the interrogation, in that Charabicente became “more remorse[ful] as he began to describe, and it all changed when I actually asked him to close his eyes and begin to tell me the events of that night.” Castillo then answered “yes” to the question, “Was it at that point when he actually admitted to you that he had put his hands on the victim’s throat and that she had – was no longer breathing?” Again, the transcript does not show any such express admission by Charabicente.

Charabicente: “That was not intentional.

Castillo: “It wasn’t intentional? So it was an accident. True?

[No verbal activity]

Charabicente: “Yes, because –

Castillo: “[Interrupting] Okay, and how did the accident occur? T— I want you to explain that thing there. . . . Do me a favor. Close your eyes and think about that moment when you’re with her. Okay? Tell me w— at what point did the accident happen? You tell me. Close your eyes and tell me your story.

[No verbal activity]

Castillo: “Tell me how the accident happened.

Charabicente: “She . . . she was way too high on drugs.

Castillo: “Okay.

Charabicente: “She started throwing blows with her hands and kicking.

Castillo: “Okay.

Charabicente: “And maybe the excess of drugs and all that, she— the— ‘cause— it ended, you know, killing her.

Castillo: “Okay. And then?

Charabicente: “‘Cause like you said, my intention wasn’t s—

Castillo: “Okay. Now you tell me, when you noticed that she stopped breathing and she was dead on your hands, what was your first thought?

Charabicente: “To revive her more [sic].

Castillo: “And then? What did you do to revive her?

Charabicente: “I pounded on her chest right there, but it didn’t –

Castillo: “And then?

Charabicente: “She didn’t react.

Castillo: “And what was your first thought when you saw that she was already dead?

Charabicente: “My thought?

Castillo: “Yes. What was your first thought when you saw that she had stopped breathing and died?

[No verbal activity]

Charabicente: “To –

Castillo: “Did you feel fear? Did you feel . . .

Charabicente: “[Overlapping voices] Uh-huh.

Castillo: “. . . anger? What did you feel?

Charabicente: “Fear, fear.

Castillo: “Did you tr—? And . . . and what did you do?

Charabicente: “Fear, ‘cause I had to be responsible for that, anyway.

Castillo: “And what happened? . . . Did this happen in your room or in the van? Did you bring her from the room to the van, or from the van to your room? How was it?

Charabicente: “No, I didn’t go inside the van.

Castillo: “And where was it that she stopped breathing, in your room or in the van?

Charabicente: “Well, in the van she was already dead.

Castillo: “But what I want is to know to understand [sic]— I want to clarify this: all this, what you’ve explained to me right now, did it happen in your room or in the van?

Charabicente: “In the van.

Castillo: “Okay. Now— Thank you for telling me the truth. Okay? I know this is not easy. When nost— when you noticed that she wasn’t breathing, uh, you . . . you’re saying that you were pounding the . . . on her chest? How? To . . . to hit the heart so that . . .

Charabicente: “[Overlapping voices] Yes.

Castillo: “. . . the heart would respond?

Charabiente: "Yes.

Castillo: "And she didn't react?

Charabiente: "She didn't react.

Castillo: "And how was it that she stopped breathing? Was it when you had your hand on her neck?

Charabiente: "No, 'cause when . . . when I put my hand on her and all that, she was still breathing.

Castillo: "And did you have one or two hands on her neck?

Charabiente: "Just one hand.

Castillo: "Okay. What caused you to g— to get mad so as to put that pressure on her? What . . . what . . . what did she do to you to make you mad?

Charabiente: "Since she was way too high on drugs, she was yelling at me, all –

Det. Rosa: "She was yelling at you where?

Charabiente: "She was yelling at me and she was –

Castillo: "[Interrupting] And did that get you angry? Because she was yelling at you?

Charabiente: "It didn't make me angry, but she was being very noisy, you know. To calm her down.

Castillo: "And what did you feel when you put pressure on her neck and noticed that she wasn't breathing anymore? How did you feel?

Charabiente: "No, what happens is that when I grabbed her, it wasn't . . . wasn't . . . that wasn't when sh— when she stopped breathing, but rather . . . what she was using, that was . . . that was affecting her. And she was coughing, you know. She was coughing hard then. I don't know if th— the drug was hurting her, or I don't know.

Castillo: "And the—and when she stopped breathing, how long did you stay there once she was already dead, before running away?

Charabicente: "I didn't stay there long.

Castillo: "Uh?

Charabicente: "I didn't stay long.

Castillo: "More or less. You tell me, more or less.

Charabicente: "I didn't stay there long.

Castillo: "Half an hour? One hour?

Charabicente: "About ten minutes.

Castillo: "Ten minutes?

Charabicente: "Five minutes.

Castillo: "And what did you do afterwards?

Charabicente: "Nothing. I walked out.

Castillo: "Have you already asked God for forgiveness for what you did?

Charabicente: "I have.

Castillo: "And w— and why did you ask Him for forgiveness?

[No verbal activity]

Castillo: "No, knowing what you have told me, and knowing what happened, what message do you want me to give her . . . her family from you?

[No verbal activity]

Charabicente: "The message that I didn't –

Castillo: "Do you want me to tell them that you regret it and to forgive you? Or what do you want me to tell them?

Charabicente: "Well . . . that I regret it.

Rosa: "You regret what?

Charabicente: "Having gotten involved with her there.

Rosa: "You got involved with her where?

Charabicente: "In my room.

Rosa: “Okay.

[No verbal activity]

Rosa: “But when was it that you entred [sic] . . . entered the van?

Charabicente: “In the van? The thing is, I used to sleep in the van before.

Rosa: “Okay. You were sleeping in the van before?

Charabicente: “Yes, before. I lived there for about a month, inside the van.

Rosa: “Okay. But I’m not talking about before. I’m talking two nights past [sic], when you were with the woman. Right?

Charabicente: “Yes.

Rosa: “Okay. Because you’re being very good. It’s – everything you’re saying’s very . . . very good right now, but we have to c—we have to continue. Okay?

Charabicente: “Yes.

Rosa: “With these [unintelligible]. So then this woman— I know that this woman is high on drugs; you are bigger; she’s speaking English to you a[nd] maybe you don’t understand what she’s saying; maybe you are – you want to defend yourselves [sic] against them [sic].

Charabicente: “Yes, that’s true.

Rosa: “So then you, ‘No, that woman is p— she’s getting crazy on me; you have to t— to understand me.’ You put more strength than . . . than wanted [sic] and it happened the – whatever happened.

[No verbal activity]

Rosa: “On those things. Are you fueling [sic] more . . . worse for that?

[No verbal activity]

Rosa: “Is that it?

Charabicente: “Yes.

Rosa: "Okay. So then when this woman was drugged, she was doing more violence with you [sic], dis— she d— dis— did, um— she . . . she came at you a— with violence, or she you [sic] wants to harm you?

Charabicente: "Like I said, you know, the noise she was making, a lot of noise.

Castillo: "What did she do to get you mad?

Charabicente: "She was – she made noise and –

Castillo: "She didn't want to have sex anymore?

Charabicente: "No, I – and I/she [unknown referent] wasn't having sex there.

Castillo: "But hav— did that make you angry, that she didn't want to have sex?

Charabicente: "No.

Castillo: "Or . . . or if – or did she make you mad because she didn't want to give you a blow job?

Charabicente: "No, no.

Castillo: "Did she suck it to you? She didn't suck it to you?

Charabicente: "No. Not that.

Castillo: "So what did she do to you in – that made you mad, then?

Charabicente: "That – She didn't make me angry. What happened was that, since I don't want people, you know, to hear that there's gonna be a lot of noise there, that's why I restrained her, you know, so she wouldn't make noise.

[No verbal activity]

Castillo: "S—say it again.

Charabicente: "That I restrained her but just so she wouldn't get too rowdy because the people who . . . who live there, you know, don't want there to be any noise, or to have anybody there.

Castillo: "The wounds she has on her neck indicate to me that there was a lot of force that you used it [sic]. You tell

me, about how much force do you think you used?
Ten . . . ten being the most, one being the least. What
number do you give it?

Charabicente: “Like I told you, you know, that . . .

Castillo: “[Overlapping voices] [Unintelligible] the question, . . .

Charabicente: “. . . that I –

Castillo: “. . . the number of force, ten being the most, one being
the 1— the least. What number do you give to the revel
[sic] of force that you used when you grabbed the neck?

Charabicente: “Maybe a three, maybe.

Castillo: “A ten?

Charabicente: “Three.

Castillo: “Three. Because the wounds she has are very . . .
very, uh, indicated [sic] of a lot of force. You tell me,
why do you think that this was necessary for you to
use a lot of force at that moment?

Charabicente: “But no, I, you know, the force I used didn’t –

Castillo: “She has marks. She has . . . she has mo— moa—
moa— signified [sic] wounds on her neck.

Charabicente: “No, I didn’t do that.

Castillo: “[Overlapping voices] What I want to know is, in
your mind, . . .

Charabicente: “Yes.

Castillo: “. . . was the force you used out of anger, or was it just
reacting in a way where you went too far?

Charabicente: “No, no, I didn’t go to far. I didn’t . . . didn’t even . . .

Castillo: “[Overlapping voices] So then it was out of anger?

Charabicente: “. . . not at all, I didn’t go too far. Nor was it out of
anger, but rather I just restrained her with a little, so she
wouldn’t –

Castillo: “[Interrupting] Okay. And that day you had nothing to
drink?

Charabicente: “I Drink. No.

Castillo: “You didn’t drink any beers that day.

Charabicente: “No.

Castillo: “And you didn’t smoke, uh, any drug that day, at all.

Charabicente: “I don’t . . . don’t smoke drugs, I don’t use drugs.

Castillo: “Alcohol either.

Charabicente: “Nor alco— Alcohol, I do, but . . .

Castillo: “[Overlapping voices] But not that night.

Charabicente: “. . . every now and then, yeah.

Castillo: “No, but not that night.

Charabicente: “Not that night.

Castillo: “Okay. Um . . . wait a moment, would you? We’ll be right back.

Rosa: “Do you want some water to drink?

Charabicente: “[Unintelligible]

[Unidentified sounds; no verbal activity]”

There was no further questioning of Charabicente.

At the conclusion of the testimony, the trial court instructed the jury on murder, and on the degrees of murder. The defense requested an instruction on involuntary manslaughter, but the court, while initially indicating that it was inclined to give the instruction, ultimately refused to do so, concluding “[i]t’s either murder or nothing.”

The jury found Charabicente guilty of murder in the second degree. Charabicente was sentenced to prison for 15 years to life.⁵ This appeal followed.

⁵ Charabicente was ordered to pay various assessments and fines and was given custody credits, none of which is at issue in this appeal.

DISCUSSION

Charabicante's sole claim on appeal is that the trial court erred when it refused his request to instruct the jury on the lesser included offense of involuntary manslaughter. We agree.

Involuntary manslaughter "is ordinarily a lesser offense of murder." (*People v. Abilez* (2007) 41 Cal.4th 472, 515.) Involuntary manslaughter is committed "either by committing 'an unlawful act, not amounting to felony' or by committing 'a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.'" (*People v. Cook* (2006) 39 Cal.4th 566, 596 (*Cook*), quoting Pen. Code, § 192, subd. (b).)⁶ "If the evidence presents a material issue of whether a killing was committed without malice, and if there is substantial evidence the defendant committed involuntary manslaughter, failing to instruct on involuntary manslaughter would violate the defendant's constitutional right to have the jury determine every material issue." (*Cook, supra*, 39 Cal.4th at p. 596.) However, malice is implied "when a killing results from an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life." (*Ibid.*) In *People v. Cleaves* (1991) 229 Cal.App.3d 367 (*Cleaves*), the court observed:

"[T]he essential distinction between second degree murder based on implied malice and involuntary manslaughter is the subjective versus objective criteria to evaluate the defendant's state of mind – i.e. if the defendant commits an act which endangers human life without realizing the risk involved, he is guilty of manslaughter, whereas if he realized the risk and acted in total

⁶ The Penal Code defines manslaughter as "the unlawful killing of a human being without malice." (Pen. Code, § 192.) Manslaughter is of the involuntary kind if the killing occurs "in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (*Id.*, subd. (b).)

disregard of the danger, he is guilty of murder based on implied malice.”⁷ (*Cleaves, supra*, 229 Cal.App.3d at p. 378.)

The necessary crux of the trial court’s refusal to instruct on involuntary manslaughter was that, assuming Charabiente killed the victim by asphyxiating her with his hand, he could not have done so – as a matter of law – without realizing, and consciously disregarding, the risk to the victim’s life. (*Cook, supra*, 39 Cal.4th at p. 596 [malice is implied if the act “is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life”]). Otherwise stated, the act of choking the victim was *necessarily* a felony, rather than “an unlawful act, not amounting to felony” that forms the basis for involuntary manslaughter. Under the evidence presented in this case, we cannot agree.

There are no doubt evidentiary circumstances under which a death by manual asphyxiation necessarily would be nothing less than murder. An analogous example appears in *People v. Jones* (1965) 232 Cal.App.2d 379, 381 (*Jones*), where the victim was strangled with a scarf. In *Jones*, an experienced autopsy surgeon testified that death was caused by strangulation, and that “a considerable amount of force must have been applied in order to cause the injuries to the decedent’s throat and neck.” (*Ibid.*) The trial court gave an involuntary manslaughter instruction, but directed the jury to consider manslaughter only if it found the defendant was intoxicated. The court of appeal rejected the defendant’s challenge to the trial judge’s direction, observing that the only theory under which involuntary manslaughter could have been selected as the right verdict “was that [the defendant] had committed an unlawful act not amounting to felony, namely,

⁷ *Cleaves* observed: “Involuntary manslaughter is defined as the commission of an act which involves a high degree of risk of death or great bodily injury, committed with criminal negligence; that is, conduct which is such a departure from the conduct of an ordinarily prudent person under the same circumstances as to be incompatible with a proper regard for human life.” (*Cleaves, supra*, 229 Cal.App.3d at pp. 378-379 [defendant who tied up victim at victim’s request so victim could strangle himself, and who admitted at trial he knew victim would die as a result of tying him up and holding him down on the bed, was not entitled to involuntary manslaughter instructions].)

battery.” (*Id.* at p. 391.) But “[t]he strangulation of the victim by such force as was described by the autopsy surgeon could hardly be thought to be mere battery” (*Ibid.*; cf. *Cook, supra*, 39 Cal.4th at pp. 596-597 [“because the evidence conclusively showed that defendant brutally beat [the victim] with a board, the jury could not have found that defendant committed a mere misdemeanor battery by administering that beating”; defendant “did not simply start a fistfight in which an unlucky blow resulted in the victim’s death” but rather “[h]e savagely beat [the victim] to death”].)

The evidence in this case is quite different from that in the *Jones* case. There was no evidence contradicting Charabicente’s claim that he put only one hand on the victim’s neck and was trying to quiet her down. The coroner testified that “the actual amount of force, . . . it’s not a large amount of force to, you know, cause somebody even just to faint or to kill somebody from strangulation.”⁸ The coroner also testified that he “put cocaine use as a contributory cause” of the victim’s death. While cocaine was not the cause of death, the coroner testified:

“I put cocaine use as a contributory cause. Cocaine does have significant physiological effects on the body, and in this case it could have affected blood pressure. And since this is essentially a vascular injury, compression of a vessel, it may have played a physiological role in this death.”

In addition, Charabicente said that he pounded on the victim’s chest to revive her, an action from which one might infer he did not perform the act that killed her “with knowledge of the danger to, and with conscious disregard for, human life.” (*Cook, supra*, 39 Cal.4th at p. 596.)

It is important to note that a defendant’s right to instructions “does not turn on the court’s assessment of credibility or the strength of the evidence.” (*Cleaves, supra*,

⁸ The coroner found abrasions (“essentially a scrape of the skin,” “a superficial defect into the skin”) as well as faint bruising on the victim’s neck, and testified that a person trying to struggle “can put their own hands on their neck, trying to get the hand or forearm off, and cause those areas of bleeding internally,” and “[t]hey can also cause those scratches on the external surface.”

229 Cal.App.3d at p. 371.) An instruction should be given if the defense’s theory is supported by substantial evidence, “which means evidence sufficient to deserve consideration by the jury, i.e., evidence from which a reasonable jury could find the existence of the facts underlying the instruction.” (*Id.* at p. 372; *People v. Saldana* (1984) 157 Cal.App.3d 443, 454 [“[w]here the defendant’s testimony or version of the evidence seems remote, the jury must be afforded the opportunity to consider it if it could be accepted by a reasonable juror or at least raise a reasonable doubt”]; cf. *People v. Coleman* (1970) 8 Cal.App.3d 722, 733 [“[h]owever incredible a defendant’s testimony, he is nevertheless entitled to an instruction based on the hypothesis that it is entirely true”].)

In this case, unlike the circumstances in *Jones* or *Cook*, the evidence “present[ed] a material issue of whether [the] killing was committed without malice”⁹ (*Cook*, *supra*, 39 Cal.4th at p. 596.) We see no basis on this record for concluding, as a matter of law, that Charabiente necessarily realized and consciously disregarded the danger to human life from his conduct. While the killing resulted “from an intentional act, the natural consequences of which are dangerous to human life” (*ibid.*), the evidence was

⁹ The People, after reciting at length the arguments made to the trial court, proffer a convoluted, and erroneous, argument to the effect that the evidence supported only two possibilities, a civilly negligent act resulting in death (under Charabiente’s version of the facts) or an intentional death, and that there was therefore no basis for an involuntary manslaughter instruction. Nonsense. Charabiente’s version of his conduct was consistent with a misdemeanor battery, i.e., “any willful and unlawful use of force or violence upon the person of another” (Pen. Code, § 242), and a battery may constitute an unlawful act for purposes of involuntary manslaughter, “if shown to be dangerous under the circumstances of [its] commission.” (See *People v. Cox* (2000) 23 Cal.4th 665, 674.) The People also argue, on the penultimate page of their brief, that “manual strangulation has been held to *per se* constitute intent to kill,” citing *People v. Hernandez* (1988) 47 Cal.3d 315, 349, and other cases. *People v. Hernandez* stated that “this method of killing [strangulation] is indicative of at least a deliberate intent to kill.” (*Ibid.*) But it did so in the context of its discussion of whether the evidence in that case was sufficient to support premeditated murder, not in the context of the propriety of instructions on involuntary manslaughter. The same is true of the other cases cited.

sufficient to permit the jury to conclude that Charabicente did not “subjectively appreciat[e] the risk to human life arising from his conduct” (*Cleaves, supra*, 229 Cal.App.3d at p. 379 [“a defendant is guilty of murder based on implied malice if he subjectively appreciates the risk to human life arising from his conduct, whereas an involuntary manslaughter conviction is warranted if he did not subjectively realize the risk”].) Because the evidence presented a material issue as to whether the killing was committed without malice, the trial court was obliged to instruct the jury on involuntary manslaughter.

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P. J.

We concur:

RUBIN, J.

FLIER, J.